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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NUMA BARNES, AN INDIVIDUAL, PLAINTIFF, VS. HOMEWARD RESIDENTIAL, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; POWER DEFAULT SERVICES, INC.; FIDELITY NATIONAL TITLE COMPANY; AND DOES 1 THROUGH 100, INCLUSIVE, DEFENDANTS.	Case No: 3:13-cv-03227-SC PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION OF HOMEWARD RESIDENTIAL, INC., ET AL, TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM Date: TBD Time: TBD Ctrm: 3, 17th Floor Judge: Hon. Richard Seeborg

Introduction

Plaintiff NUMA BARNES ("Plaintiff") herein submits her PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION OF HOMEWARD RESIDENTIAL, INC., ET AL, TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM in response to the Court's request for briefing on the preclusive effect to be given Barnes' prior California state court action under California's primary rights standard for the application of the doctrine of res judicata.

Factual Background

On April 5, 2012, Plaintiff filed a Complaint in El Dorado Superior Court (the "State Action") known as Case No. SC20120076 in the files of El Dorado Superior Court, alleging Breach of Oral Contract, Breach of Written Contract, Unfair Business Practices, and Declaratory Relief. See Doc. 56-1, p. 38. In that action, Plaintiff named American Home Mortgage Corp. dba American Brokers Conduit (hereafter "AHMC/ABC") and American Home Mortgage Servicing, Inc. (hereafter "AHMSI") as Defendants concerning the Deed of Trust ("DOT") recorded on or August 16, 2006 in the Contra Costa County Recorder's Office as instrument no. 259052 against 30 Vernal Court, Alamo, CA 94507 ("Subject Property") to secure a Promissory Note in favor of American Brokers Conduit ("ABC") in the amount of $1,300,000. In the Complaint Plaintiff alleged AHMC/ABC was also doing business as AHMSI.

Plaintiff's first cause of action concerned the broken promise to postpone foreclosure proceedings during the pendency of a loan modification work-out process that was initiated in late June 2011 based on the later recording of a Notice of Trustee's Sale before the loan modification work-out process was concluded.

Plaintiff's second cause of action concerned the broken written promise with Fannie Mae to suspend foreclosure proceedings during the pendency of loan modification review.

Plaintiff's third cause of action concerned the above-mentioned acts and also failing to contact Plaintiff as required prior to recording a Notice of Default.

And Plaintiff's fourth cause of action sought declaratory relief that Plaintiff was entitled to postponement during the review of her 2011 modification application. See Doc 56-1, pp. 38-44.

This case was transferred to Contra Costa County Superior Court.

After transfer Plaintiff added Does American Home Servicing, Inc. (hereafter "AHSI") and Fidelity National Title (hereafter "Fidelity") as Does 1 and Two to the Complaint on August 22, 2012. Plaintiff also added Homeward Residential, Inc. ("Homeward") as a Defendant on that same date.

The demurrers of Homeward and Fidelity were granted, and although Plaintiff was allowed leave to file a First Amended Complaint by January 25, 2013, she did not do so by that date.

Given the fact that a First Amended Complaint was not filed, Homeward filed an ex parte application for dismissal and judgment on February 15, 2013 which was granted on February 19, 2013.

Fidelity filed a motion for dismissal and judgment on March 26, 2013, which was granted on May 15, 2013.

Plaintiff argues herein that the instant matter is based on differing primary rights that were adjudicated in the above-mentioned State Action, and is summarized as follows.

On July 12, 2013, Plaintiff filed the Complaint in this matter for breach of express agreement, breach of implied agreement, slander of title, wrongful foreclosure, violations of Cal. Civ. Code § 2923.5, 15 U.S.C. § 1601, 18 U.S.C. § 1962, 15 U.S.C. § 1692, and Cal. Bus. and Prof. Code § 17200 (hereafter the "Federal Action".)

The 2011 modification application was not at issue in the Federal Action, nor was the relief requested of a temporary stay of foreclosure. The foreclosure was postponed, and Plaintiff is still in possession of the Subject Property.

Instead, in the Federal Action, Plaintiff complains of breaches of the Deed of Trust, due to lack of authority as required by the DOT provisions to accelerate the Note and initiate a foreclosure, arising out of acts including a failed but attempted securitization of Plaintiff's Note and DOT in 2006 and a late assignment transferring the DOT to the securitized trust on October 20, 2011 due to the fact that the trust had previously closed on September 22, 2006 and could no longer receive transfers according to its own terms. See Doc. 1, pp. 6-7.

Pursuant to recognized case law that has now been published, the instant matter seeks declaratory relief that the recorded documents are void, not voidable as was sought in the State Action, and that the primary rights doctrine is consistent with and requires such an order due to the allegations relating to the flawed securitization transaction and also based on the Plaintiff's other causes of action and not about a 2011 contractual dual-tracking violation, on which the State Action was based, but instead based on servicing rights violations for wrongfully initiating a foreclosure (but not because of dual-tracking) and federal statutory claims.

The facts are as follows that on or around September 22, 2006, ABC securitized and sold Plaintiff's DOT to a real-estate-mortgage-investment-conduit ("REMIC") trust, the American Home Mortgage Assets Trust 2006-5, Mortgage-Backed Pass-Through Certificates, Series 2006-5 ("AHMA 2006-5 Trust"). After this sale, ABC retained solely the servicing rights to Plaintiff's loan, according to Plaintiff's Property Securitization Report, a true and correct copy of which is attached to the Complaint as Exhibit A. See Ex. A, pp. 20-21.

On October 20, 2011, an Assignment of Deed of Trust was recorded in the Contra Costa County Recorder's Office by MERS purportedly transferring the beneficial interest in Plaintiff's Deed of Trust to DBNTC as Trustee for the AHMA 2006-5 Trust.

On November 9, 2011, Fidelity recorded a Notice of Default and Election to Sell Under Deed of Trust ("NOD") in the Contra Costa County Recorder's Office, thereby initiating the process of foreclosing on Plaintiff's home.

On or about February 15, 2012, Fidelity, issued a Notice of Trustee's Sale setting a Trustee's Sale signaling the final stage of the foreclosure process.

On February 15, 2012, a Substitution of Trustee was recorded in the Contra Costa County Recorder's Office. Through this document, AHMSI as Attorney in Fact for DBNTC as Trustee for the AHMA 2006-5 Trust purports to make a substitution of Trustee under the Deed of Trust in favor of Power Default Services ("PDS").

AHMSI and DBNTC's statement was intentionally false and misleading in that DBNTC as Trustee was not the purported "beneficiary" due to the prior unperfected transfer to DBNTC as Trustee for the AHMA 2006-5 Trust. This document was also signed by April King, this time as Assistant Secretary of AHMSI. Only the lender (in this case ABC or its assigns the certificate holders of the AHMA 2006-5 Trust) has the power and authority to substitute the trustee under the Deed of Trust, pursuant to a the terms of the DOT for the Subject Property pertaining to the substitution of a trustee; and in any case the foreclosure was being conducted by Fidelity, which lacked the power of sale, due to the fact Fidelity was purporting to act on behalf of DBNTC as Trustee, which was transferred at most, servicing rights due to the September 22, 2006 securitization.

Homeward continued to collect mortgage payments from Plaintiff as a servicer to Plaintiff's loan, without authorization; violating the Deed of Trust and the Pooling and Servicing Agreement ("PSA") for the securitized to which ABC transferred its beneficial interest and to which Plaintiff was a third-party beneficiary.

Law and Argument

Under California state law, "[t]wo different causes of action are the same claim if they rise from the same invasion of a primary right." *Adam Bros. Farming*, 604 F.3d at 1149 (internal citation and quotation omitted). A "primary right" is "the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based." *Fed'n of Hillside & Canyon Ass'ns v.City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004). Thus, the underlying harm—not the cause of action asserted—defines the primary right. *Adam Bros. Farming*, 604 F.3d at 1149; *Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1975). A "plaintiff is not permitted to maintain successive actions for the same injury by alleging different acts . . . on the part of the defendant." *Panos v. Great W.Packing Co.*, 21 Cal. 2d 636, 639 (1943).

In applying the primary right doctrine to foreclosure cases, courts in the Northern District have held that under California law, plaintiffs seeking to set aside a foreclosure may not re-litigate their claims in subsequent actions, even when the second lawsuit asserts different causes of action or challenges different aspects of the loan or foreclosure process. *Prado v. Quality Loan Serv. Corp.*, No. C-13-4536, 2014 WL 46634, at *1 (N.D. Cal. Jan. 6, 2014); *see, e.g.*, *Lodin v. Bank of Am., N.A.*, No. 13-04847 JSC, 2014 WL 296927, at *1 (N.D. Cal. Jan. 27, 2014); *Patel v. U.S. Bank, N.A.*, No. 13-1625 YGR, 2013 WL 5947377, at *2 (N.D. Cal. Nov. 5, 2013).

However, Plaintiff asserts herein that this type of holding of the primary rights doctrine in the foreclosure context is too general (and broad) of an approach, especially when there is not only a foreclosure process, which can typically be accomplished in approximately four months, but instead lapsing of the process by failing to record a Notice of Trustee's Sale promptly as allowed by law, failing to hold a trustee's sale within a year of recordation of the Notice of Trustee's Sale, restarting attempts to foreclose by either scheduling a new sale date or recording a new Notice of Trustee's Sale, bargaining for contracts pertaining to modification and servicing terms, entering into written and agreements concerning these matters, and statutory violations which provide additional remedies by law.

The factual allegations of each action are bounded in time by distinct parameters and should clarify the fact that there are distinct rights under the harm suffered analysis. In the State Action, the agreement in 2011 to avoid dual-tracking while a modification review transpired took precedence, along with complaints regarding the validity of Defendants declaration of compliance with Cal. Civ. Code § 2923.5 which was recorded on November 9, 2011, doc. 56-1,

p. 28, and failing to comply with Home Affordable Modification Program ("HAMP") guidelines during the 2011 review, and robo-signing of the NOD also occurring in 2011.

However, the Federal Action seeks to address the defects in securitization which occurred in or around 2006 , as well as origination claims (Doc. 1, p. 13, ¶ 80, 84) in failing to disclose a payment schedule and terms and violations of prohibitions regarding high-rate, high-fee loans, disputes that any attorney-in-fact agreement existed between AHMSI and DBNTC (Doc. 1, pp. 12-13, ¶ 53), a claim that a notice of assignment was not provided as required by the provisions of the Truth-in-Lending Act, 15 U.S.C. § 1641(g) within 30 days of transfer of Plaintiff's loan (Doc. 1, p. 19, ¶ 81), and violations of the Rackateer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 based upon the aforementioned acts and resulting mail fraud related to the transmission of false documents through the use of U.S. mail (Doc. 1, p. 24, ¶ 103.)

Some California case law provides that if the claim could have possibly been alleged in the first action, then it should have, and a new case cannot be filed later, but this would not include the mail fraud occurring up to at least August 26, 2013 when the last noticed sale was scheduled by a notice of postponement based upon the February 15, 2012 Notice of Trustee's Sale. The previous sale date was July 29, 2013, and the notice of postponement was mailed after that date and before August 26, 2013. So even under this application of res judicata, Plaintiff's claim survives. *Allied Fire Protection v. Diede Constr. Inc.*, (2005) 127 Cal. App. 4th 150, 155.

Additionally, the Notice of Trustee's Sale was only supposed to enable postponements for one year, yet, Defendants continued to postpone until approximately 18 months of the recording the notice of sale in violation of Cal. Civ. Code § 2924(a)(5), regarding which the latter postponements could not have been included due to their happening later in time. Homeward was dismissed on February 19, 2013 and Fidelity was dismissed on May 15, 2013. It would have been impossible to sue Homeward for this violation of the Civil Code based on this timeline. Violation of the Civil Code is a new claim and Plaintiff should be allowed leave to amend to so state.

Penalties for violation of this part of the Civil Code, a provision of the Homeowner's Bill of Rights Act include injunctive relief of the sale and attorneys' fees up to the completion of the sale, a continuing harm, and one which is still occurring as of the writing of this document. Cal. Civ. Code § 2924.12 (also providing economic remedies post-sale.)

Mail fraud which occurred with the mailing of the Notice of Postponement(s) is a criminal violation but Plaintiff can recover under the RICO Act as is alleged in the Complaint in the Federal Action. Penalties include litigation costs and treble damages. 18 U.S.C. § 1964(c).

Plaintiff maintains there also has been no claim-splitting as to the allegations regarding the flawed securitization attempt in 2006 and the void assignment recorded on October 20, 2011, first of all because these were not and could not have been alleged in the State Action, due to Plaintiff not having yet discovered the Pooling and Servicing Agreement and relevant contractual duties. And Plaintiff could not have discovered this contractual obligation to timely record an assignment through discovery due to the fact that the bulk of the State Action complained of failure to keep a promise not to dual-track foreclosure with the 2011 application review. Although standing was an issue, Plaintiff complained also mainly of robo-signing, but the exact nature of the violation later alleged was too unknown in 2011 to be considered part of the State Action, or this court should so find, in the interests of justice. Nevertheless, it is Plaintiff's position that this too is a distinct harm because of the recent decisions in *Glaski v. Bank of America*, 218 Cal.App.4th 1079, 1097; *see also Yvanova v. New Century Mortgage Corporation*, et al., (Feb. 1, 2016) S218973 Sup. Ct. Cal.., recently creating a right of action, and reasons therefore that did not exist before and could not have been alleged even with reasonable diligence if the State Action Complaint had proceeded.

Conclusion

Plaintiff respectfully requests that the Court overrule the MOTION TO DISMISS PLAINTIFF'S COMPLAINT and further respectfully requests that if the Court sustains the Motion to Dismiss, then the Court grant Plaintiff leave to amend the Complaint.

DATED: June 17, 2016

Respectfully submitted,

__/s/__ *Megan Ann Dailey*________________

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